

3. There was a scar five and half inches long on the top of the left foot associated with a hard and large bony lump.
4. The left foot (toe to heel) was one inch shorter than the right but there was no shortening of the left leg.
5. Movements of the left ankle were restricted, especially the downward bending of the foot (plantar flexion left ankle) which was only half that of the right.
6. The left calf was two inches thinner than the right.
7. Movements of the left knee were within normal limits.
8. X-Rays of the left foot showed multiple fractures of all the five foot bones. The 3rd foot bone was missing and the remainder were grossly displaced and the ends on the ankle side were raised and gathered in a large bone lump described in (3) above. Any union of the foot bones present was mal-union, and most of the foot bones had a rarefied (thinned) appearance."

The doctor was of the opinion that the fractures of the foot bones have resulted in gross mal-union causing the scarring, the hard bony lump, the shortening of the foot and the restriction of movement at the ankle. These deformities will be permanent, and the resulting disabilities are liable to increase with time due to the onset of osteoarthritis in coming years.

Mr. Varughese, for the respondents, in his submission has referred to the medical report of Orthopaedic Surgeon dated October 17, 1980. Before hearing this appeal, Mr. Tan Hock Kim, for the appellant, applied to the court to introduce this report and other evidence as to future loss. This court rejected the application as we see no reason why this evidence could not have been made available at the trial after a lapse of so many years from the date of the accident. The respondents were awarded costs. Since this court has rejected the appellant's application, it does not mean that the respondents are entitled to use the report. In assessing damages this court will only consider the earlier medical reports which were before the trial court and which form part of the agreed bundle of documents.

Mr. Tan, for the appellant, has suggested that there should be a special amount for loss of earning capacity in the amount of \$10,000. As no interest is to be given to this sum we are satisfied that he is claiming loss of future earnings. But no evidence was adduced to show the extent of this loss. At the time of the accident the appellant was with the Royal Malaysian Navy at K.D. Malaya, Woodlands. It was not shown in what capacity. After discharge from hospital it was shown that he worked in the sick bay of the Army. At the time of the trial he was employed as Army Bus conductor. Nonetheless, we are satisfied that with the severe injuries on the left foot, there would be loss of earning capacity. We need only refer to *Ashcroft v. Curtin*⁽³⁾ where it was held to the effect that if there is no satisfactory evidence of loss of future earnings, but the court is satisfied that the plaintiff has suffered a loss of earning capacity, it will award him damages for his loss of capacity as part of the general damages for disability and not as compensation for loss of future earnings.

In arguing on quantum both sides have referred to *Paramasivam & Anor. v. Abdul Aziz & Ors.*⁽⁴⁾ The relevant headnote reads:

"... The first plaintiff endured much pain and suffering. He had to undergo skin-grafting and the donor areas left permanent ugly scars to the left leg and both thighs. His right

leg and right foot suffered shortening and there were injuries to the toes including the loss of one toe. There was a likelihood that he might develop arthritis in his ankle joint and his right big toe and possibly pain in his right foot as a result of his deformities and injuries in the future."

The court awarded him the sum of \$19,000.

The respondents' side argues that considering the injuries in that case, which were more extensive than those in the present case, the appellant should only be awarded \$13,000. The appellant's side submits that the injuries are about the same. We find that although the injuries in the present case are on the foot, they are more massive. What the appellant has is not much of a foot but a mass of bones and flesh; the left foot has become shorter than the right foot by 1 inch, though there is no shortening of the left leg. We also have regard to the fact that this case was decided in 1976. With inflation, it should be accepted that money nowadays cannot be regarded as having the same value as in 1976. Considering all the circumstances we consider that \$22,000 is the appropriate amount for pain and suffering, loss of amenities and earning capacity in the present case. Interest at 6% from service of writ. Special damage agreed at \$400, 3% interest from date of accident.

Costs to the appellant here and in the court below. We have already ordered deposit to be refunded to the appellant.

Order accordingly.

Solicitors: *Tan & Tan; Varughese & Co.*

PALANIAPPA CHETTIAR v. SITHAMBARAM CHETTIAR & ORS.

[F.C. (Lee Hun Hoe C.J. (Borneo), Wan Suleiman & Salleh Abas F.J.J.) July 8, 9 & November 14, 1981]
[Kuala Lumpur — Federal Court Civil Appeal No. 32 of 1980]

Practice and Procedure — Probate action — Application to have preliminary issue tried — Whether plaintiff estopped from contending that alleged will is valid.

In this case one Murugappa Chettiar died in 1969 leaving a will which purported to bequeath $\frac{1}{3}$ share each to the appellant and the second respondent and certain properties to other legatees. The first respondent who was a son of the deceased was not given any share in the will and he contested the validity of the will. The appellant applied for probate of the will, while the respondent applied for letters of administration. As caveats were lodged by both parties the hearings of the applications were adjourned. The first respondent also brought proceedings in India. A compromise decree was made in India on June 29, 1972 whereby the three sons of the deceased including the appellant, the first respondent and the second respondent, agreed to share the joint family properties and all properties under the will equally. In the meantime the first respondent obtained an order for the Official Administrator to be appointed receiver and manager of the deceased's estate and subsequently an order was made that the appellant file a statement of accounts. An application was made by the appellant for the proceedings to be stayed pending the outcome of the litigation in India, but this was refused. An order was made that a probate action be instituted to propound the last will alleged to have been executed by the deceased with the appellant as plaintiff and the other parties as respondents. The 1st, 3rd and 4th defendants thereupon applied for a preliminary issue to be tried, that is whether the appellant is estopped from contending that the alleged will is valid. Wan Hamzah J. made an order accordingly and the appellant appealed.

Held: the learned judge was correct in holding that it would be convenient to try the preliminary issue, as if the contention of the respondents is upheld, this could conclude

the whole proceedings and it would be unnecessary to try the other issues.

The following cases were cited in argument: *Letchumanan Chettiar v. Palaniappa Chettiar* [1978] 1 M.L.J. 120; *Katchi Fatimah v. Mohamed Ibrahim* [1962] M.L.J. 374; *Mayhew v. Newstead* (1837) 163 E.R. 208; *Carl Zeiss Stiftung v. Rayner & Keeler Ltd.* [1967] 1 A.C. 853; *Chinnasami v. Hariharabadra* (1893) I.L.R. 16 Madras 380; *Oudh Narain Lal & Ors. v. Mt. Sukh Dulari & Ors.* A.I.R. 1950 Allahabad, 402; *Jerbanoo Rustomji Garda v. Pootlamai Manecksha Mehta* A.I.R. 1955 Bombay, 447; *Rajah Run Bahadoor Singh v. Mussumut Lachoo Koer* (1884) 12 Indian Appeals, 23; *Panchapakesa Iyer & Ors. v. K.N. Hussain Muhammad Rowther & Anor.* A.I.R. 1934 Madras, 145; *Asoka Kumar David v. M.A.M.M. Abdul Cader* [1963] 1 W.L.R. 834 (P.C.); *Vadala v. Lawes* (1890) 25 Q.B.D. 310; *Abouloff v. Oppenheimer & Co.* (1882) 10 Q.B.D. 295; *Government of State of Pahang v. Tengku Abdul Aziz & Anor.* [1978] 2 M.L.J. 34; *Carl Zeiss Stiftung v. Herbert Smith & Co. & Ors.* [1969] 1 Ch. 93; *Mooney & Ors. v. Peat, Marwick, Mitchell & Co. & Anor.* [1967] 1 M.L.J. 87; *Tong Lee Hua v. Lee Yoke San* [1981] 1 M.L.J. 54; *Sivagami Achi v. P.R.M. Ramanathan Chettiar & Anor.* [1959] M.L.J. 221; *Palaniyappan v. Ramanathan Chettiar* [1977] 2 M.L.J. 34; *Lissenden v. C.A.V. Bosch Ltd.* [1940] A.C. 412.

FEDERAL COURT.

V.K. Palasuntharam (G. Joseph with him) for the appellant.

Sri Ram for the 1st, 3rd and 4th respondents.

C. Dass for the 2nd respondent.

Cur. Adv. Vult.

Lee Hun Hoe C.J. (Borneo) (delivering the judgment of the Court): This is an appeal against the decision of Wan Hamzah J. in respect of two summonses-in-chambers which were dealt with together. The first summons dated March 2, 1979 was filed by 1st, 3rd and 4th defendants applying for an order to have an issue based upon the facts as pleaded in the defence and counterclaim be tried as a preliminary issue. That is to say, whether the plaintiff is prevented by the doctrine of estoppel or *res judicata* from:—

- (a) contending that the alleged will is valid, or
- (b) applying for probate of the alleged will in these proceedings in this country.

The second summons dated October 3, 1979 was filed by plaintiff applying for an order to strike out certain parts of the defence and counterclaim. Having heard the parties the learned judge made an order in terms in respect of the first summons. He dismissed the second summons and gave plaintiff leave to file a proper application for extension of time to deliver a reply.

It may be helpful to state the facts briefly in chronological order as proceedings were instituted not only here but also in India. Murugappa Chettiar died on February 28, 1969 in India leaving properties in India as well as in Malaysia, consisting of movable and immovable assets of MR.ST.P. Firm at Klang, Malaysia. He had three sons, namely Sithambaram Chettiar (eldest son, 1st defendant/1st respondent), Karupiah Chettiar (second son, 2nd defendant/2nd respondent) and Palaniappa Chettiar (youngest son, plaintiff/appellant). 1st defendant has two sons, the eldest is the 3rd defendant/3rd respondent whilst the youngest the 4th defendant/4th respondent. Deceased was alleged to have executed a will dated March 31, 1968 registered as his last will under the provisions of the Indian Registration Act, 1908. The will purported to bequeath 1/3rd share each to plaintiff and 2nd defendant and certain properties to other legatees.

A On July 8, 1969 plaintiff applied for probate by filing in the High Court in Kuala Lumpur Petition No. 360 of 1969 on the ground that he was one of deceased's sons and named in the will as sole executor. On July 30, 1969, 1st defendant filed a separate application for Grant of Letters of Administration of deceased's estate vide Petition No. 366 of 1969. As caveats were lodged by both parties against each other's application the hearings of both applications were adjourned *sine die*.

B On September 23, 1969 1st defendant also initiated a suit in the Subordinate Court, Pudukottai, India against his two younger brothers vide Originating Summons No. 57 of 1969. The suit claimed for partition and separate possession of movable and immovable properties in India and Malaysia on the ground that they are joint Hindu family properties belonging to the three brothers. Plaintiff contested the suit on the ground that under the will 1st defendant had been disinherited and he was not entitled to any share in the properties. 1st defendant challenged the validity of the will.

D By a notice of motion dated October 31, 1969 1st defendant applied, *inter alia*, for the Official Administrator or such other person as the court thinks fit to be appointed as the Receiver and Manager of deceased's estate and to submit from time to time accounts of the estate. On February 2, 1970 Yong J. made a consent order that the Official Administrator be appointed the Administrator Pendente Lite of the deceased's estate and that the parties submit a draft order setting out the terms thereof for the approval of the court. A further consent order was made by Yong J. on April 6, 1970 incorporating certain additional terms into the earlier consent order, *inter alia*, that the Administrator Pendente Lite forthwith take possession and complete control and management of the properties of the estate including the money lending business of MR.ST.P. Firm. Pursuant to the order dated April 6, 1970 S.M. Thiagarajah the agent of deceased at the time gave possession of the business of MR.ST.P. Firm and certain movable and immovable properties and also account books to the Official Administrator. The accounts were kept in an unsatisfactory state and required explanations from the agent and plaintiff. To avoid questioning both the agent and the plaintiff remained in India.

E Pursuant to an application by 1st defendant vide summons-in-chambers dated October 14, 1970, Mohamed Azmi J. made an order that the plaintiff do file into court a statement of account under Order 33 rule 2 of the Rules of the Supreme Court and that the 1st defendant and all other interested parties do file a surcharge and falsification of the said account and upon the said account an inquiry be held by the court. Unfortunately, no time was specified for filing of the said account. Consequently, 1st defendant had to apply for various consequential orders by another summons-in-chambers dated December 7, 1971. On January 12, 1972 Mohamed Azmi J. made another order incorporating various terms, *inter alia*, that plaintiff do file into court statement of account within 30 days from the date of service of the said order dated September 13, 1971.

I Plaintiff applied by summons-in-chambers dated

April 7, 1972 for an order that all proceedings in respect of Originating Motion No. 35 of 1969 be stayed and in particular the performance of the order dated January 17, 1972 until the outcome of the Originating Summons No. 57 of 1969 filed in the Subordinate Court, Puddukottai, India. On June 29, 1972 a compromise decree was made in India whereby the three brothers had agreed to share the joint family properties and all properties under the will equally, that is, each party is to have one-third share. For the plaintiff it was contended that as a result of the compromise the will had been accepted as valid by 1st defendant and others. Since 1st defendant's cause of action is based on the invalidity of the will he has no more leg to stand on. On the other hand, 1st defendant contended that the will had completely been thrown overboard by the compromise. He brought the suit in India primarily to challenge the validity of the will as he was totally excluded from the will. Therefore, if the will was held valid in India then that would be the end of his claim to a share in the estate not only in India but also here. In his grounds of judgment dated December 27, 1972 Mohamed Azmi J. after referring to the compromise decree, expressed the view that plaintiff by consenting to give 1st defendant and his sons one-third share of the estate had by inference admitted that the will was invalid. He considered that the Subordinate Court in India had not in fact recognised the will. The learned judge rightly pointed out at page 8 of his judgment (see page 372 of Part 2 of the Appeal Record) that even plaintiff's counsel mentioned in his affidavit that 1st defendant embarked on prolonged litigation in India and here because he was excluded from the will and that plaintiff's counsel even conceded that 1st defendant in fact has interest in the deceased's estate.

The learned judge concluded thus:—

"...If so, then it is clear that the will could not have been valid, and the applicant's protestation that all the properties are joint Hindu family properties and not self-acquired properties has all along been well founded. Under the circumstances, there is much force in the applicant's (1st defendant's) allegation of fraud on the part of the respondent (plaintiff) not only in respect of the will but also in the management of the deceased's properties in Malaysia, particularly relating to the moneylending business in Klang."

So, the learned judge refused stay of proceedings in respect of Originating Motion No. 35 of 1969 and in particular the order dated January 17, 1972 requiring plaintiff to file accounts.

After the compromise decree was made plaintiff brought a suit (Original Suit No. 45 of 1976) in the court of the District Judge of Puddukottai praying for a declaration that the said decree made by the Subordinate Court, Puddukottai was void, inoperative and unenforceable and for an injunction. On June 29, 1978 the learned District Judge rejected the plaintiff's contention that the Subordinate Court had no jurisdiction to make a decree. The question of jurisdiction was never raised in the Subordinate Court. In fact plaintiff submitted to the jurisdiction of the Subordinate Court resulting in the making of the compromise decree. It was pointed out that the aim of the suit was merely to prevent 1st defendant and other parties from getting their due shares and to enable plaintiff to escape from rendering accounts and from the surcharge and falsification of accounts in

A the court here. His *bona fide* in filing the suit was questioned. His suit was dismissed with costs.

B He appealed against the dismissal to the High Court of Judicature at Madras. The appeal was directed against the order of the lower court refusing to grant an injunction restraining the respondents from taking steps for division of properties and possession of the same till disposal of the suit for a declaration that the compromise decree passed in Originating Summons No. 46 of 1975 was void. On November 9, 1976 Ramanujam J., dismissing the appeal stated at page 4 (see page 247 of Part I of the Appeal Record) that:—

C "The compromise decree was passed on June 29, 1972 and the suit for declaration that the compromise decree is void had been filed only in the year 1976 when the first respondent approached the court for passing of the final decree. If really the appellant's signature in the compromise memo was taken fraudulently, he would have challenged the compromise decree then and there. The fact that he kept quiet for a period of four years after the compromise decree was passed indicates in a way that he was a consenting party to the compromise and that he was aware of the contents of the compromise memo at the time when he signed the same. I have, therefore, to agree with the view of court below that no *prima facie* case has been made out for the issue of an injunction."

D On June 19, 1978 Mohamed Azmi J. made an order that a writ be issued in a probate action to propound the last will alleged to have been executed by deceased, and that Palaniappa be made plaintiff and the other parties be made defendants and the Official Administrator as an interested party. The sooner the matter is settled the better.

E It is therefore not surprising that Wan Hamzah J. found no merit in striking out any part of the defence and counterclaim. We do not propose to go into the numerous cases cited on estoppel and *res judicata*. F These matters are best left to be fully argued at the trial. In his grounds dismissing the application dated October 3, 1979 at page 5 (see page 66 of Part I of the Appeal Record) he made these observations:—

G "...I do not see any reason why the defendants should be shut off from raising the matters to support their challenge to the validity of the Will. The procedure adopted by the plaintiff is misconceived. Instead of applying for order to strike out, the plaintiff should argue those grounds at the trial of the suit. I therefore dismiss the plaintiff's application."

H As regards application dated March 2, 1979 he considered that it would be convenient to have the issue raised in paragraphs 14 and 15 of the defence and counterclaim tried as a preliminary issue. Having regard to the background of this case we see no reason to interfere with the decision of the learned judge. In fact we agree with his conclusion that:—

I "If the defence's contention is upheld this would conclude the whole proceedings, and it would not be necessary to try the other issues, i.e. questions of capacity to execute the alleged Will, sanity and undue influence. For the trial of those other issues, evidence would have to be obtained from India and this can be expensive and time-consuming...."

Accordingly, we dismiss the appeal with costs. Deposit to respondents on account of taxed costs.

Appeal dismissed.

Solicitors: Lawrence & Joseph; Sri Ram & Co.; Shook Lin & Bok.